undertaking the Defendants do not contest, I make an Order that the Defendants be restrained pending trial of the action by itself, its servants or agents, from disposing of or dealing with any part of the net proceeds of sale of the Sungei Besi property insofar as the same do not exceed $16,823,443/– otherwise than by or pursuant to an Order of Court. This does not mean that these proceeds will necessarily remain sterilized for the benefit of the Plaintiffs for the Court can permit the Defendants to use them for paying *bona fide* debts as they fall due and upon sufficient proof of an intention to do so: see *Iraqi Ministry of Defence* v. *Arcepey Shipping Co. S.A. (supra)* and provided always the Defendants are able to rebut the inference of a real risk of default (the *Third Chandris (supra)* per Denning, M.R. at p.672) which I have drawn from the evidence now before me.

It follows, therefore, that it would be open to any creditor of the Defendants, and indeed to the Defendants themselves, to apply for a variation of this Order if they so wish.

In the result, I uphold both prongs of the Plaintiffs' submissions aforesaid and order that the costs of this application be paid by the Defendants to the Plaintiffs.

*Order accordingly.*

Solicitors: *Presgrave & Matthews; Shearn, Delamore & Co.*

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## IN RE DIVORCE PETITIONS NOS. 18, 20 and 24 of 1983

**[O.C.J. (Shankar J.) February 23, 1984]**
**[Johore Bahru Divorce Petitions Nos. 18, 20 & 24 of 1983]**

*Family Law – Divorce – Mutual Consent – Requirements for exercise of jurisdiction by the Court – Divorce and Matrimonial Rules, 1980, r. 32 and 33 and Form 3 – Law Reform (Marriage and Divorce) Act, 1976, ss. 47, 52, 53 & 54.*

*Family Law – Divorce – Scope of section 52 of Law Reform (Marriage and Divorce) Act 1976 – Irretrievable breakdown of marriage still sole ground for divorce – Application of judicial discretion.*

In this case joint petitions for divorce came up for disposal. The petitions followed Form 3 as prescribed by the Divorce and Matrimonial Rules, 1980. The question of law which arose was where a joint petition for dissolution of marriage is presented under section 52 of the Law Reform (Marriage and Divorce) Act, 1976 is the mere mutual consent of the petitioners to the dissolution the sole criterion for the grant of the decree nisi.

**Held:** (1) irretrievable breakdown of marriage is still the sole ground for divorce under the Law Reform (Marriage and Divorce) Act, 1976. Mutual consent by the spouses to a decree of dissolution does not of itself entitle them to a divorce. Such a mutual consent cannot of itself oust the jurisdiction of the courts to enquire into, if it thinks fit, and decide whether in all the circumstances it is just and reasonable that the decree should be made;

(2) Form 3 of the Divorce and Matrimonial Rules is not a magic formula which by a mere repetition of its terms entitles the parties without more (except the signature of their counsel) to a dissolution. To comply with section 57(1)(d) and (2) of the Act it would suffice if a statement is made in the joint petition to the effect that the marriage has irretrievably broken down and that both parties mutually agree that the marriage should be dissolved. A statement is also required in the petition as to the steps taken to effect a reconciliation;

(3) it is desirable that the contents of the joint petition should be the subject of an affidavit in support by the petitioners.

*Cases referred to:*

(1) *Sim Kim Ong* v. *Goh Phaik Sooi* [1976] 1 M.L.J. 232.

(2) *Santos* v. *Santos* [1972] 2 All E.R. 246; [1972] Fam. 247.

DIVORCE PETITIONS.

*Teh Poh Teik* for the first petitioner in Petition No. 18.

*K.R. Muthu* for the second petitioner in Petition No. 18.

*Gary Yuen* for both petitioners in Petition No. 20.

*Karam Singh* for both petitioners in Petition No. 24.

*Cur. Adv. Vult.*

**Shankar J.**: On January 9, 1984 numerous joint petitions for divorce came up for disposal in this court. They faithfully followed Form 3 as prescribed by the Divorce and Matrimonial Rules 1980 (the Rules) and invoked the jurisdiction of this court under section 52 of the Law Reform (Marriage and Divorce) Act 1976 (the Act).

The common question of law which arise out of these petitions may be stated thus:–

"Where a joint petition for dissolution of a marriage is presented under section 52 of the Act, is the mere mutual consent of the petitioners to the dissolution the sole criterion for the grant of the decree nisi?"

In other words were there absolutely no conditions for the purpose of testing the sincerity or the strength of the declared wish of both spouses to be divorced?

To put it another way, where such mutual consent has been declared in the joint petition, must the judicial dissolution of the marriage follow even if the court is satisfied that the marriage has not irretrievably broken down?

All counsel who argued the matter were emphatic in their view that the answer to these questions was a categorical affirmative. Their reasons are as follows.

Section 52 of the Act on a plain reading thereof states that the only pre-conditions to a dissolution by mutual consent are that:

a. The parties must be married for more than 2 years;
b. They must freely consent to the dissolution; and
c. Proper provision must be made for the wife and for support, care and custody of the children.

Indeed the marginal note to section 52 reads: "Dissolution by mutual consent."

Once the spouses had mutually agreed to dissolve the marriage it was submitted that the court had no power whatsoever to inquire into the adequacy of the reasons for the joint petition because the satisfaction of the court was not related to the basis on which such mutual consent had been reached.

A comparison was made between section 52 and section 51 which provided for a unilateral petition for dissolution where the other party had converted to Islam and to section 53 which also provided for a unilateral petition for divorce by either spouse on the ground that the marriage had irretrievably broken down. In a section 53 situation the consent of the other spouse was not available and accordingly the petitioner had to satisfy the court with evidence that the marriage had broken down and that it was just and reasonable for the marriage to be dissolved.

Section 54 was referred to as merely setting out some circumstances which would lead the court to the conclusion that breakdown had in fact occurred.

Then reference was made to section 106 of the Act, which specifically excludes a petition under section 52 from its ambit. Since conciliation under section 106 is irrelevant it must necessarily follow that the effect of mutual consent is to bring down a curtain through which the court is not permitted to enter.

Furthermore nowhere in the Form 3 under the Rules was there any statement required to be made that the marriage had in fact come to an end. It merely required the parties to state that they mutually consented to the dissolution.

Reference was also made to the case of *Sim Kim Ong* v. *Goh Phaik Sooi*[1] and the various English cases cited therein on the principles to be applied when construing the clear words of a statute. This was a decision of the Federal Court on the effect of section 7 of the Sarawak Matrimonial Causes Ordinance.

The *ratio* of the case really relates to the jurisdiction of the court to entertain the petition but in the course of its judgment the court also recognised the power of a court in Sarawak to dissolve a marriage by mutual consent in the circumstances set out in section 7 of the Sarawak Ordinance.

As stated in the judgment of Lee Hun Hoe, C.J. (Borneo) at page 233

"Divorce by mutual consent is recognised in Sarawak as part of the Chinese customary law ... The Chinese custom of dissolution of marriage by mutual consent has been extended to civil marriages in Sarawak by the Matrimonial Causes Ordinance (Cap. 94)"

Strong reliance was also placed by counsel on two passages extracted from the report of the Royal Commission on Non-Muslim Divorce and Marriage Laws. They read as follows:–

"(a) ... divorce may be granted either "where circumstances have arisen which make it just and reasonable that the marriage should be dissolved", or by mutual consent, with proper safeguards for the wife and children ..."

"The result of importing the essential features of sections 6 and 7 of the Sarawak Ordinance will be greatly to simplify the law. The proposed reform will eliminate the vexing problems of condonation, free of all restrictions, with a view to reconciliation. These artificial bars to relief, in the

opinion of the Commission, serve no useful purpose and deserve to be jettisoned without any regrets. Divorce by mutual consent makes collusion irrelevant."

It was urged upon me that section 52 of the Act was based upon section 7 of the Sarawak Ordinance and that mutual consent alone being enough in Sarawak should also be enough in Peninsular Malaysia.

In view of the very different wording of the English Divorce Reform Act 1969, and its successor the Matrimonial Causes Act 1973, it was argued that the English legislation and the case of *Santos* v. *Santos*[2] were irrelevant.

Hence section 47 of the Act which requires this court to "give relief on principles which in the opinion of the court are as, nearly as possible, conformable to the principles on which the High Court of Justice in England acts and gives relief on matrimonial proceedings," had no application. The proviso to section 47 saved section 52 of the Act from any English influence.

At the risk of some distortion the argument that mere mutual consent by itself was enough to sustain an application for a divorce may be summarised thus:–

(1) The clear words of section 52 showed that once there was mutual consent a decree must follow as a matter of course, any powers of curial enquiry being directed only to the reality of the consent and the provision made for maintenance and custody;

(2) The statutory Form 3 under the Rules was complete in itself and required no assertion that the marriage was at an end;

(3) The Report of the Royal Commission reinforced the view;

(4) The Sarawak Ordinance and case cited was applicable in Malaya and had the same effect.

Counsel were unanimous in their view, but if I may, with respect, be permitted to echo the words of the Chief Justice in his recent welcome address to Legal Officers called to the Bar what were "the implications and consequence of (these arguments) in terms of humanity?"

Joint petitions in our courts have already started to fall into a pattern. Usually they are not signed by the petitioners. Indeed rule 9 provides that a joint petition under section 52 shall be signed by the solicitors of the parties and since the plural is thought to include the singular there have been numerous cases where petitioners are represented by a single solicitor. In many cases the petitioners do not bother to come to court. The grant of the decree, especially if no children are involved, has tended to become an administrative act, with the court being reduced to a mere rubber stamp.

If the conspicuous disregard for the sanctity of marriage is not very evident in all this, should the recognition of the fact that the judge is now presiding over an empty ritual, not compel a searching enquiry into whether this was, indeed what the law intended?

Although the marginal note to section 52 does read "Dissolution by mutual consent," the note to section 53 reads "Breakdown of Marriage to be sole ground for divorce." The section goes on to specify that the breakdown must be irretrievable.

The words "sole ground" must as a matter of definition exclude dissolution by mutual consent as a distinct ground unless it was accompanied by irretrievable breakdown of marriage.

Mutual consent to a dissolution does not necessarily mean that a marriage has broken down. Spouses married for 2 years can have one violent quarrel resulting in an impetuous resolution that the marriage should be dissolved.

Subjective decisions do not generally stand up to objective examination and viewed in perspective the marriage may be very much alive.

Again the material words in section 52 can take on a different shade of meaning if given a slightly different emphasis:–

> "If husband and wife mutually agree that their marriage should be dissolved they may ... present a joint petition accordingly and the court *may, if it thinks fit,* make a decree of divorce, upon being satisfied that both parties freely consent, and that proper provision is made ... and *may attach such conditions* to the decree of divorce as it thinks fit." (Italicised for emphasis)

If a divorce must axiomatically follow a statement of mutual consent, without curial investigation, should the material words not have read, "the court shall make a decree of divorce upon being satisfied that both parties freely consent." It is hard to see in what circumstances the discretion to impose conditions to the decree of divorce

could ever arise, if judicial inquiry is totally excluded. Were the words "if it thinks fit" in this context then not intended to mean "if it thinks it just and reasonable to do so."?

After all it is not just the husband and wife who are involved in the marriage. There are children and possibly also dependent parents-in-law who may be injuriously affected by the dissolution. At the very least therefore is the court denied even the power to enquire whether it should impose a cooling off period if the circumstances warrant? To concede to counsel's submission is to bring in the guillotine!

Section 57 of the Act (italicised for emphasis) states, *inter alia*, that –

"(1) *Every* petition for divorce shall contain (d) a statement of the principal allegations which it will be sought to prove as evidence of the breakdown of the marriage;" and

"(2) *Every* petition for a divorce shall estate what steps had been taken to effect a reconciliation."

In contrast to section 106, section 57 does not exclude section 52 petitions.

"Every petition" in section 57 must therefore, in my view, include a petition under section 52 unless there are compelling reasons to the contrary.

Under the powers conferred by section 108 of the Act, the Rules Committee made the Divorce Rules to regulate the practice and procedure in all matrimonial proceedings under the Act.

Whereas Form 2 is specifically covered and referred to by rules 8, 19(1), (2) and (3) and 80 and 81 there does not appear to be any rule which specifically refers to Form 3. Has it been left to be implied that Form 3 is intended to cover section 52?

But Form 3 by itself does not fully comply with section 57(1)(d) and (2) since it totally omits any allegation as to the breakdown of the marriage, or as to the steps taken to effect a reconciliation.

Counsel's submission on this aspect of the matter was that section 57(1)(d) of the Act was not intended to apply to a section 52 petition since no proof of any "evidence of the breakdown of the marriage" was required for a joint petition and as for section 57(2) the exclusion of the conciliatory body by section 106 made it mere surplusage.

What is interesting about Form 3 is that it does not appear to require to be supported by any affidavit. It need not even be signed by the petitioners. In effect therefore, when a joint petition in Form 3 comes up for hearing all that the court has before it are averments in a pleading but no evidence whatsoever of the facts stated in the Form, let alone any evidence of irretrievable breakdown. Unless one is to rely on sixth sense one wonders how the courts are to make a finding that the parties have freely consented to the divorce package on this kind of material.

As to the steps to be taken to effect a reconciliation referred to by section 57(2) surely reference to a conciliatory body is not the only way to effect a reconciliation. The in-laws and near relatives, dependants, friends and solicitors themselves could have tried to effect a rapprochement.

If the mutual consent to dissolution by the spouses has the effect of a matrimonial iron curtain behind which no angel may rush in, it may well also make a dead-letter of section 55 of reconciliation of parties who have become estranged, or to impose a cooling-off period at any stage of divorce proceedings. It does not exclude section 52 petitions and like section 57 stands in sharp contrast to section 106 in this respect.

Out of deference to Counsel I now refer to some other passages of the Report of the Royal Commissioners which seem to me to be not irrelevant, and came immediately after the passages chosen for citation by Counsel.

"The Commission accepts these principles and now makes the following recommendations:

(a) that divorce may be granted either "where circumstances have arisen which make it just and reasonable that the marriage should be dissolved", or by mutual agreement, with proper safeguards for the wife and children;

(b) that, before granting a decree the court is required to inquire into the facts to satisfy itself that the marriage has irretrievably broken down;

(c) that attempts at reconciliation be made before the filing of any petition for divorce and that proceedings in court may be adjourned at any stage and for such period as the court thinks fit, to encourage reconciliation;

(d) that in order to curb impetuous and hasty resort to divorce no petition for divorce may be presented (except in special circumstances) unless three years have elapsed since solemnisation of the marriage;

(e) that *before* making a decree the court shall take into

consideration the interests of the child or children of the marriage and of either party likely to be adversely affected thereby and that, *upon* granting a decree, the court do so upon such terms and subject to such conditions as it deems fit and just to both parties."

Thus when looking at the Report in its proper context there are reasonable grounds for believing that the Commissioners were not recommending that divorce petitions presented on grounds of mutual consent should be excluded from the salutary provisions of the Act designed to try and save the marriage or at least minimise its adverse effects in conciliation proceedings designed to bring the parties to some realistic arrangements for their separation if reconciliation was truly impossible.

In the explanatory statement of the Timbalan Menteri Undang-Undang in the Dewan Negara on the effect of section 52, he said:–

"A significant new feature is dissolution of marriage by mutual consent. Here too, the parties will have to wait for two years after the marriage before resorting to this remedy. The rationale of this provision is that where a couple mutually agree that it is in their best interests that their marriage should be dissolved, they should be allowed to do so quietly without recrimination and unnecessary publicity and quarrel. In granting this remedy the court's power is discretionary and it will have to be satisfied that the parties had freely agreed to this remedy and consent of one party was not obtained by fraud or force. This is a new provision which is being introduced in the Bill which the existing law does not provide. This is called dissolution of marriage by mutual consent provided the consent is freely given; provided the dissolution is asked for after two years of marriage and if both parties agree then everything will be done quietly without unnecessary publicity. The court's power to grant this remedy is discretionary. But the court is expected to have regard to the consent of the parties. If both parties agree that they could not live together, that the marriage has failed and that it is in their best interest to dissolve it, then they have the right under this Clause to go before the court and say so. The court has the discretion to accept and grant it on the basis that they are adults and they can decide for themselves that their marriage failed."

The sensitivy of the implications of section 51 and the delicacy which was called for in debating these implications seems to have over-shadowed a debate in depth on the implications of section 52.

The statements in the Commissioner's Report and the debates in Parliament are of great historical interest, but their value in the correct legal interpretation of a statute remains problematical. The same may be said of the marginal notes to the various sections. Reference may be made in this context to the authorities cited by *Craies* on Statute Law 7th Edition at page 127 *et seq* and at page 195.

For the purposes of this judgment therefore it would be safer if we relied solely on the language of the statute for its meaning.

This is an appropriate juncture to consider the effect of section 47 of the Act. Unlike section 5 of the Civil Law Act 1956 which only imports the application of English Law in certain matters as it stood on July 7, 1956, section 47 of the Act has no limitation. It must therefore be read in a contemporaneous context and if applied must refer to the corresponding position in England today.

I fully agree with the submissions of counsel that the different wording of the English Statute makes the English situation inapplicable to Malaysia. The case of *Santos* v. *Santos*[2] cannot apply to a joint petition under section 52 of the Act.

The principles on which the High Court of Justice in England acts and gives relief in petitions for divorce in England today are governed by the special procedure which was first introduced in 1973. Its avowed object was to make divorce simpler and cheaper. Initially it was applied only to undefended cases where the parties had lived apart for 2 years and there were no children of the marriage. In 1975 it was extended to undefended childless divorces on all grounds except where it was alleged that the respondent had behaved in such a way that the petitioner could not reasonably be expected to live with the respondent. In 1977 it was extended further to all undefended cases whether or not children were involved. The divorce file was examined by a Registrar and if the conditions were fulfilled, the Registrar issued a certificate. The file was thereupon forwarded to the Judge who had to pronounce decree *nisi* in Open Court. The attendance of the parties was dispensed with. The petitions appear to have been called out for hearing in bulk and it seems that Judges have come to a situation where they merely say "I pronounce decree nisi in cases 1-50." (See Eekalaar, J. "Family Law & Social Policy" (1978)). Juristic comment is that the special procedure has resulted in a spiralling of the divorce rate in England. Are we going the same way?

Section 47 of the Act may create far more problems than it solves. Indeed the time may well have come when serious consideration should be given to the omission of such provisions which

are likely to give rise to uncertainty and confusion not only in the application and the interpretation of Malaysian Law but also in deciding which English laws are or are not applicable.

In the Bill to amend the Singapore Women's Charter, Clause 82 was identically worded to section 52 of the Malaysian Act. It did not survive the attention of the Select Committee who decided that it was at odds with and ran counter to Clause 83 which is the equivalent of our sections 53 and 54. Proven irretrievable breakdown remains the only ground for divorce in Singapore. An additional reason give was that the Act should not make it easy for the parties to terminate the marriage because there would otherwise be no incentive to make a success of the marriage by trying to overcome temporary difficulties.

The experience of other Commonwealth countries does not appear to be very different and subject to correction it does not seem to be the case that apart from Sarawak and Malaysia mutual consent is thought to have been legislated as a distinct ground for dissolution of marriage.

The role of the court today, is to answer the legal question which was formulated at the outset of this judgment.

On a reasonable construction of the language of the Act I hold that mere mutual consent by the spouses to a decree of dissolution does not of itself entitle them to a divorce. Such mutual consent cannot of itself oust the jurisdiction of the courts to enquire into, if it thinks fit, and decide whether in all the circumstances it is just and reasonable that the decree should be made. In my view irretrievable breakdown of a marriage is still the sole ground for a divorce, under the Act.

Any other construction of section 52 of the Act is not only counter to the scheme of the Act and the other sections which I have already referred to but also goes against the grain of judicial policy which views all provisions which have a tendency to oust the jurisdiction of the courts with disfavour. It matters not that such exclusions are spelt out in contracts for commercial arbitration or for that matter even in statutes where judicial exclusion would only be countenanced if the statutory provisions were clear beyond a peradventure.

Next I hold that Form 3 of the rules is not a magic formula which by a mere repetition of its terms entitles the parties without more (except the signature of their counsel) to a dissolution. To hold otherwise is reminiscent of the historical anachronism of allowing the "forms of action to rule us beyond our graves". Besides section 23 of the Interpretation Act 1967 clearly states that any subsidiary legislation which is inconsistent with an Act, including the Act under which the subsidiary legislation was made, shall be void to the extent of the inconsistency.

These forms are generally models which are to be used *mutatis mutandis* as the circumstances of the case requires. To comply with section 57(1)(d) and (2) I hold that it would suffice if a concise statement is made in the joint petition to the effect that the marriage has irretrievably broken down and that both parties mutually agree that the marriage should be dissolved. A statement is also required in the petition as to the steps taken to effect a reconciliation.

This will bring the petition in line with section 57 of the Act.

To overcome the problem of the need for some evidence before the court before a decree can be granted it seems desirable that the contents of the joint petition should be the subject of an affidavit in support by the petitioners. Reference may also be made to section 58 of the Evidence Act which dispenses with proof of facts which are agreed to or admitted by the parties subject to the proviso giving the court a discretion in the matter to require facts admitted to be proved otherwise than by admissions. Consideration should also be given to the provisions of rules 32 and 33 of the Rules.

I have already said that the reports of the Commissioners and the Parliamentary debates are of doubtful value for the construction of the Act. Whilst the case of *Sim Kim Ong* v. *Goh Phaik Sooi*[1] is deserving of the highest respect, it is observed that the *ratio* of that case related to the jurisdiction of the court to entertain a petition in Sarawak notwithstanding that the marriage had been contracted abroad. The Sarawak Ordinance does not make irretrievable breakdown the sole ground for a divorce. The provisions in the Act requiring steps to be taken for reconciliation are also missing. I am therefore unable to say with any degree of confidence that the Sarawak decision can be applied across the border into Peninsular Malaysia.

Before I conclude I would like to place upon record the debt of this court to everyone who has contributed to this decision. I would like to single out for special mention M/S P.K. Nathan, Teh Poh Teik, Gary Yuen, Karam Singh and Miss Julie Lim. Two counsel felt so strongly about their views that they felt compelled to state that if the court was going to insist that a statement should be included in Form 3 that the marriage had irretrievably broken down, they would discharge themselves and leave their clients to engage other counsel who would be prepared to comply. The courage of sticking to one's principles may be an admirable trait at the best of times but counsel's duty to advance the cause of his client, to uphold the dignity of the court and to secure the greater interests of justice may be better served by exhausting the appellate process.

Admittedly the matter is beset with real difficulties which makes it very desirable, in the meantime, for rule 105 to be invoked and for the Chief Justice to be invited to issue directions for the purpose of securing due observance of the statutory requirements and uniformity of practice in such matrimonial proceedings.

With 8 years experience of this legislation behind us and the vicarious experience of other Commonwealth jurisdictions to fall back upon perhaps the time has also come for all concerned to review the entire position to see whether we are really going in the right direction.

*Order accordingly.*

Solicitors: *Abdul Raman Saad & Associates; Muthu & Co.; Arthur Lee & Co.; Yeow & Chin.*